

PAGES 1 - 29

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER, JUDGE

BANK OF AMERICA, N.A.,)

ET AL.,)

)
PLAINTIFFS,)

)
VS.) NO. C 99-4817 VRW

)
CITY AND COUNTY OF) {EXCERPT OF TRANSCRIPT}

SAN FRANCISCO, ET AL.,) ORDER GRANTING

) PRELIMINARY INJUNCTION
DEFENDANTS.)

_____)

SAN FRANCISCO, CALIFORNIA

MONDAY, NOVEMBER 15, 1999

APPEARANCES:

FOR PLAINTIFFS COVINGTON & BURLING

BANK OF AMERICA & 1201 PENNSYLVANIA AVENUE, N.W.

WELLS FARGO: WASHINGTON, D.C. 20004

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COVINGTON & BURLING

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SAN FRANCISCO, CALIFORNIA 94108

BY: RICHARD DARWIN, ESQUIRE

(APPEARANCES CONTINUED)

REPORTED BY: DIANE E. SKILLMAN,
OFFICIAL COURT REPORTER

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FOR PLAINTIFF PILLSBURY, MADISON & SUTRO LLP
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FOR DEFENDANT MARSHA JONES MOUTRIE, CITY ATTORNEY
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MONICA: SANTA MONICA, CALIFORNIA 90401
BY: ADAM RADINSKY, DEPUTY CITY ATTORNEY
 EDA U. SUH, DEPUTY CITY ATTORNEY

AMICUS CURIAE: OFFICE OF THE COMPTROLLER OF THE
 OF THE CURRENCY
 250 E. STREET, S.W.
 WASHINGTON, D.C. 20219

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1 * * * * *

2 THE COURT: THE PLAINTIFFS IN THESE CASES ARE TWO
3 NATIONALLY-CHARTERED BANKS AND A CALIFORNIA BANK TRADE
4 ASSOCIATION. THE PLAINTIFFS CHALLENGE TWO SIMILAR CITY
5 ORDINANCES FORBIDDING THE ASSESSMENT OF FEES TO NONACCOUNT
6 HOLDERS USING BANK AUTOMATED TELLER MACHINES.

7 ON OCTOBER 12, THE CITY COUNCIL IN SANTA MONICA
8 ADOPTED SECTION 4.32.040 TO ITS MUNICIPAL CODE, FORBIDDING BANK
9 ATM'S FROM CHARGING FEES FOR NONACCOUNT HOLDERS USE OF ATM'S.

10 ON NOVEMBER 2, THE VOTERS IN THE CITY AND COUNTY OF
11 SAN FRANCISCO PASSED A NEARLY IDENTICAL INITIATIVE, PROPOSITION
12 F, REQUIRING THE ADOPTION OF THE SAME LAW INTO SAN FRANCISCO'S
13 MUNICIPAL CODE SECTION 648.1.

14 THESE ORDINANCES WERE ENACTED WITH THE STATED GOALS
15 OF PROTECTING CONSUMERS AGAINST EXCESSIVE FEES AND OF
ENSURING

16 COMPETITION AMONG SMALLER BANKS AND CREDIT UNIONS.

17 ON NOVEMBER 3, PLAINTIFFS COMMENCED THIS ACTION
18 AGAINST THE CITIES AND VARIOUS CITY OFFICIALS ALLEGING THAT THE
19 ORDINANCES AS APPLIED TO NATIONALLY-CHARTERED BANKS ARE
20 PREEMPTED BY FEDERAL LAW AND THAT THE DOCTRINE OF
SEVERABILITY

21 PREVENTS ENFORCEMENT OF THE ORDINANCES AGAINST STATE
CHARTERED

22 BANKS ONCE THE ORDINANCES ARE INVALIDATED AS TO

23 NATIONALLY-CHARTERED BANKS.

24 THE COURT GRANTED THE PLAINTIFFS' MOTION FOR AN

25 EXPEDITED HEARING ON THEIR MOTION FOR PRELIMINARY INJUNCTION.

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1 THE OFFICE OF THE COMPTROLLER OF THE CURRENCY WAS PERMITTED
TO

2 APPEAR AND HAS APPEARED AS AMICUS CURIAE.

3 AS A PRELIMINARY MATTER, SANTA MONICA ARGUES THAT IT
4 IS IMPERMISSIBLY JOINED IN THIS ACTION AS A PARTY AND SHOULD BE
5 SEVERED. FEDERAL RULE OF CIVIL PROCEDURE 20 GOVERNS PERMISSIVE
6 JOINDER. SANTA MONICA SEEKS TO TRANSFER THE VENUE OF THE
7 ACTION AGAINST IT TO THE CENTRAL DISTRICT OF CALIFORNIA. SANTA
8 MONICA ARGUES THAT THE TWO ORDINANCES WERE SEPARATELY
ENACTED

9 AND THUS NOT PART OF THE SAME TRANSACTION OR OCCURRENCE.

10 THE TWO ORDINANCES UNDER CHALLENGE ARE SUBSTANTIALLY
11 IDENTICAL AND ARE BEING CHALLENGED ON THE SAME LEGAL
GROUNDS;

12 THE CASE THUS POSES BASICALLY THE SAME QUESTION OF LAW FOR
BOTH

13 DEFENDANTS.

14 THE ENACTMENT OF THE TWO ORDINANCES WOULD APPEAR TO
15 BE PART OF A SERIES OF LOCAL ENACTMENTS DESIGNED TO REGULATE
OR

16 PROHIBIT ATM FEES CHARGED BY THE OWNERS OR OPERATORS OF AT
17 LEAST SOME ATM'S. IN FACT, THE MEMORANDUM OF THE SANTA
MONICA

18 CITY ATTORNEY, DATED OCTOBER 5, 1999, ATTACHED AS EXHIBIT E TO

19 SANTA MONICA'S MEMORANDUM, MAKES REFERENCE TO THE FACT
20 THAT

21 SEVERAL CALIFORNIA CITIES ARE CONSIDERING A BAN ON ATM
22 SURCHARGES AND SPECIFICALLY REFERENCES THE SAN FRANCISCO
23 PROPOSITION F WHICH IS CHALLENGED HERE IN THIS ACTION.

24 CONSIDERATION OF THE CHALLENGES TO THE ORDINANCES IN
25 ONE ACTION WILL SERVE THE INTERESTS OF JUDICIAL ECONOMY AND
26 CONSERVE THE PARTIES' RESOURCES. FURTHERMORE, THE DISPUTE

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1 INVOLVES PURELY LEGAL DETERMINATIONS. THERE ARE NO FACTUAL
2 DISPUTES. IT IS UNLIKELY THAT THIS COURT'S RULING ON THIS
3 MATTER WILL BE THE LAST JUDICIAL WORD ON THE SUBJECT AND
4 CONSIDERATION OF THE PRESENT CHALLENGES WILL SIMPLY EXPEDITE
5 PROMPT AND ORDERLY APPELLATE REVIEW OF THE SUBJECT. THERE IS
6 MUCH TO BE GAINED BY ADJUDICATING THE TWO ORDINANCES IN ONE
7 PROCEEDING.

8 RULE 20 PERMITS JOINDER WHEN THE EVENT STEMS FROM
9 THE SAME SERIES OF TRANSACTIONS OR OCCURRENCES AND WHEN
THERE
10 IS ANY QUESTION OF LAW OR FACT COMMON TO ALL DEFENDANTS. THE
11 STANDARD OF RULE 20 HAS THEREFORE BEEN MET, AND SANTA
MONICA'S
12 MOTION UNDER RULE 20 IS DENIED.

13 NOW THE CHALLENGED ORDINANCES PROHIBIT THE CHARGING
14 OF FEES FOR ATM SERVICES BY FINANCIAL INSTITUTIONS. OTHER
15 INSTITUTIONS ARE NOT REGULATED BY THESE ORDINANCES AND
16 PRESUMABLY CAN CONTINUE TO CHARGE FEES TO THEIR USERS.

17 THE ORDINANCES PROHIBIT ONLY ONE CLASS OF ATM
18 CHARGES --- SURCHARGES LEVIED AGAINST NONACCOUNT HOLDER
USERS
19 OF THE MACHINES BY THE FINANCIAL INSTITUTION WHICH OPERATES
THE

20 MACHINE. FOREIGN FEES, THAT IS, CHARGES LEVIED BY AN ATM
21 USER'S OWN BANK FOR USING ANOTHER BANK'S ATM REMAIN LAWFUL
22 UNDER THE ORDINANCES. FURTHERMORE, BANK ATM OPERATORS ARE
23 STILL PERMITTED TO CHARGE THE NONACCOUNT HOLDER'S BANK AN
24 INTERCHANGE FEE FOR PROCESSING THE TRANSACTION. THE
CHALLENGED

25 LAWS ARE ENFORCEABLE BY PRIVATE RIGHTS OF ACTION AGAINST THE

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1 BANKS AND ANY INDIVIDUAL WHO IS CHARGED A FEE IN VIOLATION OF
2 THE ORDINANCES MAY BRING SUCH A CIVIL ACTION.

3 SANTA MONICA'S ORDINANCE CONTAINS A SEVERABILITY
4 CLAUSE; SAN FRANCISCO'S ORDINANCE DOES NOT. SANTA MONICA'S
5 ORDINANCE BECAME EFFECTIVE ON NOVEMBER 11, SAN FRANCISCO'S
6 ORDINANCE HAS NOT YET TAKEN EFFECT, BUT IS EXPECTED TO BECOME
7 EFFECTIVE IN EARLY DECEMBER.

8 TO PREVAIL ON A MOTION FOR PRELIMINARY INJUNCTION,
9 THE MOVING PARTY MUST SATISFY ONE OF TWO TESTS AVAILABLE IN
10 THIS CIRCUIT. UNDER THE TRADITIONAL TEST, THE MOVING PARTY
11 MUST DEMONSTRATE ONE, IRREPARABLE INJURY IF THE RELIEF IS
12 DENIED, TWO, PROBABILITY OF SUCCESS ON THE MERITS, THREE, A
13 BALANCE OF POTENTIAL HARM THAT FAVORS THE MOVING PARTY, AND
14 FOUR, PUBLIC INTEREST THAT FAVORS THE INJUNCTION.

15 UNDER AN ALTERNATIVE TEST, THE MOVING PARTY CAN
16 PREVAIL BY DEMONSTRATING EITHER, ONE, A COMBINATION OF
PROBABLY
17 SUCCESS ON THE MERITS AND THE POSSIBILITY OF IRREPARABLE INJURY
18 IF THE RELIEF IS NOT GRANTED, OR TWO, THE EXISTENCE OF SERIOUS
19 QUESTIONS GOING TO THE MERITS, AND A BALANCE OF HARDSHIPS
THAT
20 TIPS SHARPLY IN FAVOR OF THE MOVING PARTY. PLAINTIFFS APPEAR

21 TO HAVE SATISFIED THE REQUIREMENTS UNDER BOTH STANDARDS.

22 THE ORDINANCES ARE LIKELY TO BE INVALIDATED AS

23 PREEMPTED BY FEDERAL LAW AS APPLIED TO NATIONALLY-CHARTERED

24 BANKS. NATIONALLY-CHARTERED BANKS SUCH AS PLAINTIFFS, BANK
OF

25 AMERICA AND WELLS FARGO, ARE HEAVILY REGULATED BY THE
NATIONAL

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1 BANK ACT. THIS ACT AUTHORIZES NATIONALLY-CHARTERED BANKS TO
2 EXERCISE ALL INCIDENTAL POWERS AS NECESSARY TO CARRY ON THE
3 BUSINESS OF BANKING. THE PRIMARY REGULATOR OF BANKS
CHARTERED

4 UNDER THE ACT IS THE OFFICE OF THE COMPTROLLER OF THE
CURRENCY.

5 THAT OFFICE HAS THE DISCRETION TO AUTHORIZE ACTIVITIES BEYOND
6 THOSE SPECIFICALLY ENUMERATED IN THE NATIONAL BANK ACT.

7 THE ORDINANCES IMPLICATE AN INCIDENTAL POWER
8 ESSENTIAL TO THE BUSINESS OF BANKING. AN OFFICE OF THE
9 COMPTROLLER OF THE CURRENCY REGULATION EXPRESSLY PERMITS
ANY

10 NATIONAL BANK TO CHARGE ITS CUSTOMERS NONINTEREST CHARGES
AND

11 FEES. THAT IS 12 CFR SECTION 7.4002(A).

12 THE PROVISIONS OF THE NATIONAL BANK ACT STRONGLY
13 SUGGEST THAT THE ACT PREEMPTS THE FIELD OF REGULATION OF ATM
14 USER FEES DISPLACING THE POWER OF THE MUNICIPAL DEFENDANTS TO
15 SET FEES, OR AS WITH THE ORDINANCES UNDER REVIEW, TO PROHIBIT
16 THE CHARGING OF THOSE FEES ALTOGETHER.

17 IN BANK ONE VERSUS GUTTAU, THE EIGHTH CIRCUIT COURT
18 OF APPEALS REVERSED A DISTRICT COURT'S DENIAL OF A PRELIMINARY
19 INJUNCTION SOUGHT BY A NATIONALLY-CHARTERED BANK TO PREVENT

20 ENFORCEMENT OF AN IOWA STATUTE GOVERNING ATM'S IN THAT
STATE.

21 THE IOWA STATUTE PROHIBITED OWNERSHIP OF ATM BY OUT-OF-STATE
22 FINANCIAL INSTITUTIONS AND IMPOSED CERTAIN OTHER SO-CALLED
23 CONSUMER PROTECTION MEASURES REGULATING ADVERTISING AND
HOURS
24 OF OPERATION OF ATM'S.

25 THE COURT OF APPEALS NOTED THAT THE NATIONAL BANKING

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1 ACT GRANTS TO NATIONAL BANKS "ALL SUCH INCIDENTAL POWERS AS
MAY

2 BE NECESSARY TO CARRY ON THE BUSINESS OF BANKING," QUOTING
FROM

3 TITLE 12 UNITED STATES CODE SECTION 24(SEVENTH).

4 THE SUPREME COURT HAS OBSERVED THAT THE GRANT OF
5 BOTH ENUMERATED AND INCIDENTAL POWERS ORDINARILY PREEMPT
6 CONTRARY STATE LAW. STATE LAW WHICH STANDS AS OBSTACLE TO
7 ACCOMPLISHMENT AND EXECUTION OF SUCH CONGRESSIONAL INTENT
MAY

8 BE FOUND PREEMPTED. THE EIGHTH CIRCUIT OBSERVED THAT THE 1996
9 AMENDMENTS TO THE NATIONAL BANK ACT MAKE CLEAR THAT ATM'S
ARE

10 NOT SUBJECT TO STATE REGULATIONS DEALING WITH BRANCHING AND
11 LIKE MATTERS AND THUS WHATEVER REGULATORY AUTHORITY THE
STATES

12 RETAIN WITH RESPECT TO NATIONAL BANK BRANCHES, THE 1996
13 AMENDMENT CLEARLY EXPRESSES CONGRESS' INTENT THAT THAT
14 AUTHORITY NO LONGER EXTENDS TO NATIONAL BANK ATM'S.

15 THE SUPREME COURT HAS MADE CLEAR THAT
16 INTERPRETATIONS OF THE NATIONAL BANK ACT BY THE COMPTROLLER
OF

17 THE CURRENCY ARE ENTITLED TO GREAT WEIGHT. IN THIS CASE THE
18 COMPTROLLER OF THE CURRENCY HAS MADE ABUNDANTLY CLEAR

THAT HE

19 CONSIDERS THE ORDINANCES AT BAR TO BE PREEMPTED BY THE
NATIONAL

20 BANK ACT.

21 THE MUNICIPAL DEFENDANTS IN THIS CASE REPEAT THE

22 CONTENTION OF THE IOWA SUPERINTENDENT OF BANKING IN THE BANK

23 ONE CASE THAT THE FEDERAL ELECTRONIC FUNDS TRANSFER ACT, NOT

24 THE NATIONAL BANK ACT APPLIES, AND THAT STATE REGULATION OR

25 PROHIBITION OF ATM FEES IS PERMISSIBLE UNDER THE
ANTIPREEMPTION

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1 PROVISION OF THE ELECTRONIC FUNDS TRANSFER ACT.

2 DEFENDANTS' CONTENTION THAT THE ELECTRONIC FUNDS
3 TRANSFER ACT TRUMPS THE NATIONAL BANK ACT IS PREDICATED ON
THE
4 ARGUMENT THAT THE ELECTRONIC FUNDS TRANSFER ACT IS THE MORE
5 SPECIFIC OF THE TWO ENACTMENTS AND THE MORE RECENT, AND,
6 THEREFORE, TAKES PRIORITY. THE EIGHTH CIRCUIT MADE SHORT
7 SHRIFT OF THAT ARGUMENT IN BANK ONE, NOTING THAT THE
8 ANTIPREEMPTION PROVISION OF THE EFTA IS SPECIFICALLY LIMITED TO
9 THE PROVISIONS OF THE EFTA DOES NOT EXTEND TO ANY OTHER
FEDERAL
10 STATUTE AND DOES NOT GRANT THE STATES OR MUNICIPALITIES ANY
11 ADDITIONAL AUTHORITY TO REGULATE NATIONAL BANKS THAT THE
STATES
12 WOULD OTHERWISE NOT POSSESS.

13 FURTHERMORE, EVEN IF THE EFTA SUPPLIED THE
14 APPLICABLE FEDERAL LAW, IT IS DOUBTFUL THAT ATM FEE
REGULATION
15 OR PROHIBITION OF THE ORDINANCES AT BAR IS PERMISSIBLE UNDER
16 THAT STATUTE. THAT SORT OF CONSUMER PROTECTION MEASURES OR
THE
17 KIND OF CONSUMER PROTECTION MEASURES THAT THE EFTA APPEARS
TO
18 CONTEMPLATE FOR THE STATES AND LOCALITIES RELATE TO ATM USER

19 SAFETY, SUCH AS LOCATION, INSTALLATION AND LIGHTING OF ATM
AND,

20 POSSIBLY, DISCLOSURE OF FEES AND OTHER TERMS AND CONDITIONS OF

21 ELECTRONIC TRANSFERS. ATM FEE REGULATION OR PROHIBITION GOES

22 TO THE ABILITY OF A NATIONAL BANK TO INSTALL AND OPERATE ATM'S

23 AND CANNOT UNDER ANY REASONABLE STRETCH BE CONSIDERED A
MEASURE

24 NECESSARY TO PROTECT CONSUMERS. MOST LIKELY, STATE AND
LOCAL

25 ATM FEE REGULATION OR PROHIBITION WOULD DISCOURAGE OR IMPAIR

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1 THE PROVISION OF ATM SERVICES TO CONSUMERS, RATHER THAN
FOSTER

2 THE PROVISION OF SUCH SERVICES TO CONSUMERS.

3 THESE AUTHORITIES ESTABLISH BEYOND QUESTION THAT
4 THERE IS A SERIOUS QUESTION WHETHER THE ORDINANCES AT BAR ARE
5 PREEMPTED BY FEDERAL LAW. INDEED, THE LAW IS SUFFICIENTLY
6 CLEAR THAT IT WOULD APPEAR THAT PLAINTIFFS HAVE NOT MERELY
7 RAISED SERIOUS QUESTIONS ABOUT THE VALIDITY OF THE ORDINANCES
8 AT BAR, BUT HAVE IN FACT SATISFIED THE ALTERNATIVE ARTICULATION
9 OF THE PRELIMINARY INJUNCTION TEST BY SHOWING A LIKELIHOOD OF
10 SUCCESS ON THE MERITS.

11 IT IS ALSO CLEAR THAT THE PLAINTIFFS, HAVING RAISED
12 SERIOUS QUESTIONS AS TO THE VALIDITY OF THE ORDINANCES, THE
13 PLAINTIFFS ARE ENTITLED TO AN INJUNCTION IF THE BALANCE OF
14 HARDSHIPS TIP STRONGLY IN THEIR FAVOR.

15 ENFORCEMENT OF THE ORDINANCES PENDING RESOLUTION OF
16 THE DISPUTE WOULD CAUSE PLAINTIFFS GREAT HARM BECAUSE THEY
WILL

17 NOT BE ABLE TO RECOVER THE FEES LOST DURING THE PERIOD OF THE
18 INJUNCTION IF THEY ULTIMATELY PREVAIL ON THE MERITS.

19 PLAINTIFFS WILL EITHER REPROGRAM THEIR ATM'S TO PROHIBIT
20 WITHDRAWALS BY NONACCOUNT HOLDERS, AS HAS ALREADY BEEN

DONE BY

21 WELLS FARGO AND BANK OF AMERICA IN SANTA MONICA, OR WILL
SIMPLY

22 STOP CHARGING NONACCOUNT HOLDERS THE FEES.

23 IN EITHER CASE, THOUSANDS OF DOLLARS OF REVENUE WILL

24 BE LOST EACH MONTH, AND PLAINTIFFS HAVE NO FEASIBLE MEANS OF

25 LATER RECOVERING FEES FROM INDIVIDUALS WHO USE THE MACHINES

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1 WITHOUT PAYING THESE FEES. THERE IS NO QUESTION THAT SUCH
HARM

2 IS SIGNIFICANT.

3 THE CITIES CONTEND THAT THEY WILL SUFFER HARDSHIP IN
4 NOT EXECUTING THEIR LAWS AND ENFORCING THE WILL OF THE PEOPLE
5 EITHER DIRECTLY OR THROUGH THEIR ELECTED REPRESENTATIVES.
6 ADDITIONALLY, RESIDENTS AND VISITORS TO THESE TWO CITIES WILL,
7 ACCORDING TO THE CITY, SUFFER THE HARDSHIP OF PAYING UNLAWFUL
8 FEES IF THE ORDINANCES ARE ENJOINED AND THEN ULTIMATELY
UPHELD.

9 HOWEVER, THE HARM THAT IS POINTED TO BY THE CITIES
10 CAN BE AVOIDED BY REQUIRING THE BANKS TO ESCROW THE FEES
11 COLLECTED PENDING THE OUTCOME OF THE DISPUTE. THE BANKS ARE
12 CAPABLE OF LATER REFUNDING THE FEES TO THE ATM CUSTOMERS IF
THE
13 CITIES EVENTUALLY PREVAIL. WHILE BOTH PARTIES AGREE THAT SOME
14 INDIVIDUALS MAY NEVER BE LOCATED, THE BANKS' SUGGESTION THAT
15 THEY COULD DONATE EXCESS FEES TO SOME FORM OF CONSUMER
FRAUD

16 DETECTION DEPARTMENT OF THE CITIES IS A SATISFACTORY SOLUTION
17 TO ANY UNCLAIMED FEES THAT MAY BE LEFT OVER.

18 THESE FACTS ESTABLISH THAT THE BALANCE OF HARDSHIPS
19 TIPS SHARPLY IN PLAINTIFFS' FAVOR. THE PLAINTIFFS HAVE THUS

20 ESTABLISHED THAT A PRELIMINARY INJUNCTION SHOULD ISSUE IN
THEIR

21 FAVOR UNDER THE ALTERNATIVE TEST. FURTHERMORE, THE
IRREPARABLE

22 INJURY WHICH THE PLAINTIFFS HAVE DEMONSTRATED FURNISHES THE
23 FIRST AND THIRD GROUNDS OF THE TRADITIONAL FOUR-PART TEST FOR
A

24 PRELIMINARY INJUNCTION. WITH RESPECT TO THE PROBABILITY OF

25 PLAINTIFFS' SUCCESS ON THE MERITS AND THE PUBLIC INTEREST

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1 FACTOR, PLAINTIFFS TOO HAVE DEMONSTRATED THE EXISTENCE OF
THESE

2 FACTORS. ALTHOUGH THERE IS RELATIVELY LITTLE CASE LAW, THE
3 EIGHTH CIRCUIT DECISION IN BANK ONE COGENTLY REASONED AND
4 LIKELY TO BE FOLLOWED BY THE OTHER CIRCUITS. FURTHER, THE
5 SUPREME COURT HAS COUNSELED THE COURTS SHOULD PAY HEED TO
THE
6 POSITION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY IN
7 SUCH MATTERS.

8 THE PARTIES DISAGREE ABOUT WHETHER THE INJUNCTION
9 SHOULD APPLY TO ALL BANKS OR TO ONLY NATIONAL BANKS. IF THE
10 LAW ARE PREEMPTED, THEY ARE ONLY PREEMPTED AS TO NATIONAL
11 BANKS. SO THE ISSUE IS WHETHER THE ORDINANCES SHOULD BE
12 SEVERED SO AS TO EXEMPT NATIONAL BANKS AND REMAIN EFFECTIVE
13 AGAINST STATE CHARTERED BANKS. TO APPLY THE SEVERABILITY
14 DOCTRINE, THE CONTESTED PROVISION MUST BE GRAMMATICALLY,
15 FUNCTIONALLY, AND VOLITIONALLY SEPARABLE FROM THE REMAINING
16 PORTION OF THE ORDINANCE. THE CITIES ARGUE THAT THE PROVISIONS
17 ARE FUNCTIONALLY SEVERABLE: THE LAWS COULD FUNCTION IN THE
18 PROPOSED SEVERED FORM. IF THE PURPOSE OF THE ORDINANCES IS TO
19 FOSTER COMPETITION, SEVERANCE WILL MOST LIKELY DEFEAT THIS
20 PURPOSE. BANNING THE SURCHARGES BY THE LARGER,

21 NATIONALLY-CHARTERED BANKS WAS THE KEY TO THE PURPOSE
22 UNDERLYING THESE ORDINANCES.

23 BOTH ORDINANCES CLAIM TO BAR FEES IMPOSED BY
24 FINANCIAL INSTITUTIONS. THE BANKS CONTEND THAT SINCE THE TERM
25 "FINANCIAL INSTITUTION" IS DEFINED TO INCLUDE BOTH NATIONAL AND

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1 STATE CHARTERED BANKS, THE ORDINANCES ARE NOT
GRAMMATICALLY

2 SEPARABLE. AN ENACTMENT PASSES THE GRAMMATICAL TEST WHERE
THE

3 LANGUAGE OF THE STATUTE IS MECHANICALLY SEVERABLE, THAT IS,

4 WHERE THE VALID AND INVALID PARTS CAN BE SEPARATED BY

5 PARAGRAPH, SENTENCE, PHRASE, OR EVEN SINGLE WORDS. BUT THERE

6 IS NO PARAGRAPH, SENTENCE, CLAUSE, PHRASE, OR WORD THAT COULD

7 BE SEVERED FROM THE LANGUAGE OF THE ORDINANCES AT BAR THAT

8 WOULD YIELD A LAW WHICH APPLIED ONLY TO ONE CLASS OF BANK.

9 SAN FRANCISCO ARGUES THAT THE ORDINANCE CAN BE

10 GRAMMATICALLY SEVERED BY REDEFINING THE MEANING OF
FINANCIAL

11 INSTITUTIONS TO INCLUDE ONLY STATE CHARTERED BANKS. BUT FOR

12 THE COURT TO SEVER IN THIS CASE WOULD ENTAIL A WHOLESAL

13 INTRUSION BY THE COURT INTO THE LEGISLATIVE PROCESSES OF THE

14 CITY AND COUNTY OF SAN FRANCISCO, AN INVITATION OF THE CITY

15 ATTORNEY FOR THE COURT TO DO SO IS SURPRISING UNDER THESE

16 CIRCUMSTANCES.

17 FURTHERMORE, THE VOLITIONAL SEVERABILITY TEST IS NOT

18 MET HERE. THE STATED PURPOSE OF THE SANTA MONICA ORDINANCE IS

19 TO PROVIDE A MEANS OF ENSURING THE VIABILITY OF SMALL BANKS.

20 TO ENFORCE THIS LAW AGAINST ONLY THAT CLASS OF BANKS WOULD
21 INDEED THWART THE STATED PURPOSE OF THE LAW. THEREFORE,
22 DESPITE SANTA MONICA'S SEVERABILITY CLAUSE, THE COURT FINDS
THE
23 ORDINANCE IS NOT SEVERABLE IN THIS FASHION.

24 THE SAN FRANCISCO ORDINANCE, OF COURSE, WAS ENACTED
25 VIA VOTER INITIATIVE. IT IS, THEREFORE, HARDER TO DETERMINE

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1 THE VOLITIONAL INTENT OF ADOPTING THIS LEGISLATION. CERTAINLY
2 MANY VOTERS WERE MOST CERTAINLY MOTIVATED BY THEIR
3 SELF-INTEREST IN NOT HAVING TO PAY AN ATM USAGE FEE. THE
4 ORDINANCE WAS PLACED ON THE BALLOT BY THE SAN FRANCISCO
BOARD
5 OF SUPERVISORS. THE PREAMBLE OF THE SAN FRANCISCO ORDINANCE
6 EXPRESSES THE SAME CONCERNS ABOUT THE ANTICOMPETITIVE EFFECT
OF
7 ATM SURCHARGES, AND IT APPEARS THAT THESE CONCERNS
MOTIVATED
8 THE BOARD OF SUPERVISORS TO DRAFT THE ORDINANCE. REGARDLESS,
9 SINCE THE STATE CHARTERED BANKS ARE NOT GRAMMATICALLY
SEPARABLE
10 FROM THE NATIONAL BANKS, THE INJUNCTION MUST APPLY TO BOTH.
11 ACCORDINGLY, THE COURT GRANTS THE MOTION OF THE
12 PLAINTIFFS. AND AS PART OF THE INJUNCTION, THE BANKS ARE
13 REQUIRED TO ESCROW AND TO KEEP RECORDS ON ALL ATM
NONACCOUNT
14 HOLDER FEES COLLECTED DURING THE PERIOD OF THIS LITIGATION.
15 IN ADDITION, THE BANKS WILL BE REQUIRED TO POST
16 BOND. AND MR. BRUCE, I AM INCLINED TO REQUIRE POSTING OF A
17 BOND IN THE AMOUNT OF \$50,000, WHICH WOULD APPEAR TO COVER
THE
18 BASIC LITIGATION COSTS THAT ARE INVOLVED.

19 ARE YOUR CLIENTS PREPARED TO POST A BOND IN THAT
20 AMOUNT?

21 MR. BRUCE: THEY ARE, YOUR HONOR.

22 THE COURT: VERY WELL.

23 THEN THAT WILL BE THE ORDER. IS THERE ANYTHING
24 FURTHER?

25 MR. RADINSKY: EXCUSE ME, YOUR HONOR.

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1 I KNOW MR. BERNHARD HAS SOMETHING AS WELL.

2 THE CITY FILED EVIDENTIARY OBJECTIONS TO THE THREE

3 DECLARATIONS FILED WITH THE BANKS' PAPERS. AND WE
ADDITIONALLY

4 WANT TO OBJECT ON THE RECORD TODAY TO THE DECLARATION OF

5 MR. LYTEN (PHONETIC) ON THE GROUNDS THAT IT IS HEARSAY,

6 SPECULATION AND LACKS FOUNDATION.

7 THE COURT: NONE OF THE MATTERS TO WHICH OBJECTION

8 WERE MADE WERE RELIED UPON BY THE COURT.

9 MR. RADINSKY: VERY WELL.

10 ANOTHER MATTER IS THE SAVINGS AND LOAN INSTITUTIONS

11 AND CREDIT UNIONS, FOR EXAMPLE, IN BOTH OF THESE CITIES WANT A

12 CLARIFICATION FROM YOUR HONOR ABOUT YOUR ORDER, WHETHER IT

13 WOULD APPLY TO ALL FINANCIAL INSTITUTIONS OR JUST TO BANKS PER

14 SE.

15 THE COURT: I DON'T BELIEVE THAT YOU CAN SEVER THESE

16 PROVISIONS. AND I THINK THAT -- IS THAT NOT CLEAR?

17 MR. RADINSKY: YOUR HONOR MENTIONED THE TERM

18 "BANKS". THIS APPLIES TO ALL FINANCIAL INSTITUTIONS?

19 THE COURT: I DON'T BELIEVE THAT UNDER THE

20 CIRCUMSTANCES FOR THE REASONS THAT I INDICATED THAT YOU CAN

21 SEVER ONE KIND OF FINANCIAL INSTITUTION FROM THE OTHERS.

22 MR. RADINSKY: VERY WELL.

23 DOES YOUR HONOR'S ORDER ABOUT THE FUNDS BEING PLACED
24 IN ESCROW, DOES THAT APPLY TO EVERY FINANCIAL INSTITUTION IN
25 BOTH CITIES?

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1 THE COURT: IT APPLIES TO THE PARTIES.

2 MR. RADINSKY: WELL, YOUR HONOR, THERE ARE MANY
3 OTHER FINANCIAL INSTITUTIONS WHICH UNDER -- AS I UNDERSTAND
4 YOUR HONOR'S RULING, WILL HAVE THE BENEFIT OF YOUR RULING.

5 THE COURT: WHAT I AM ENJOINING IS ANY ENFORCEMENT
6 ACTIONS BY THE CITY AND COUNTY OF SAN FRANCISCO AND BY SANTA
7 MONICA IN THE MEANTIME WITH RESPECT TO THE SECURITY THAT IS
8 BEING POSTED AND WITH RESPECT TO THE ORDER WITH RESPECT TO
9 ESCROWING, THAT CAN ONLY APPLY TO THE PARTIES THAT ARE BEFORE
10 ME.

11 MR. RADINSKY: ALTHOUGH THE INJUNCTION GOES BEYOND.

12 THE COURT: THE INJUNCTION GOES BEYOND THAT. THAT
13 IS CORRECT. NOW IF YOU WISH TO SEEK RELIEF WITH RESPECT TO
14 OTHERS, YOU CAN CERTAINLY DO SO, BUT I AM NOT IN A POSITION TO
15 ENJOIN PARTIES THAT ARE NOT BEFORE THE COURT.

16 MR. RADINSKY: VERY WELL.

17 AS TO THE BOND UNDER RULE 65, YOUR HONOR, I WOULD
18 SUBMIT THAT THE AMOUNT OF \$50,000 APPARENTLY JUST FOCUSES ON
19 THE LITIGATION COST TO THE CITY ATTORNEYS OFFICES RATHER THAN
20 TO THE POTENTIAL HARM OF THE PUBLIC OF THESE TWO CITIES.

21 THE COURT: THERE IS NO HARM THAT THE CITY SUFFER IN

22 THEIR OWN CAPACITY, AND IF THE FUNDS ARE ESCROWED DURING THE
23 PENDENCY OF THE LITIGATION, THEN IF THE CITIES ULTIMATELY
24 PREVAIL, THOSE FUNDS CAN BE REMITTED TO THE USERS OF FEES, SO
25 THERE IS NO HARM TO THOSE USERS DURING THE PENDENCY OF THE

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1 LITIGATION.

2 MR. RADINSKY: WE WOULD OBJECT FOR THE RECORD, YOUR
3 HONOR, THAT THAT ORDER WOULD VIOLATE RULE 65 AS NOT PROVIDING
A
4 SUFFICIENTLY SAFE MECHANISM FOR ASSURING PROPER PAYMENT.

5 ALSO THAT THEIR EVIDENCE SUBMITTED WITH BASICALLY
6 THIS PROMISE THAT THEY WILL DO THEIR BEST AND THAT THEY WILL
7 KEEP TRACK OF ALL THESE FEES. THAT IS INSUFFICIENT UNDER RULE
8 65 AND THAT WE NEED A CHANCE TO CONDUCT INVESTIGATION AND
9 DISCOVERY INTO THE TRUTH OF THE PROCEDURES --

10 THE COURT: I ASSUME THE CASE IS GOING TO GO ON.

11 MR. RADINSKY: VERY WELL.

12 THE COURT: ALL RIGHT.

13 MR. BRUCE?

14 MR. BRUCE: YOUR HONOR, THANK YOU VERY MUCH.

15 ANTICIPATING THAT YOU MIGHT WANT TO PUT INTO YOUR
16 ORDER SOME SPECIFIC LANGUAGE ABOUT THE REFUND MECHANISMS,
WE

17 HAVE A PROPOSED ORDER TO TENDER FOR YOUR CONSIDERATION.

18 PERHAPS YOU HAVE ALREADY WRITTEN YOURS. WE HAVE GIVEN IT TO
19 THE OTHER SIDE THIS AFTERNOON. AS TO --

20 THE COURT: WHY DON'T YOU SUBMIT THAT, AND I WILL

21 TAKE A LOOK AT IT.

22 MR. BRUCE: YES.

23 HOW MANY COPIES WOULD YOU LIKE?

24 THE COURT: HOW ABOUT THREE.

25 MR. BRUCE: THREE. HERE ARE THREE COPIES.

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1 (DOCUMENTS HANDED TO COURT.)

2 MR. BRUCE: AS TO THE FORM OF THE INJUNCTION ORDER,
3 OUR MOTION PAPERS AND PROPOSED ORDER WERE VERY SPECIFIC, AND
4 THEY WERE SPECIFIC FOR A VERY SPECIFIC REASON.

5 THE ONLY WAY THAT ANY OF THE BANKS ARE PROTECTED BY
6 YOUR HONOR'S ORDER IS TO ENSURE THAT THE ORDINANCES ARE NOT
7 ALLOWED IN SANTA MONICA'S CASE TO REMAIN EFFECTIVE DURING THE
8 COURSE OF LITIGATION, AND IN SAN FRANCISCO'S CASE, TO ENSURE
9 THAT THE BOARD OF SUPERVISORS, WHICH HAS THE LAST MINISTERIAL
10 ACT IN THE PROCESSES, NOT ALLOW TO APPROVE THE INITIATIVE AND
11 SEND OUT, IF YOU WILL, INTO THE LAW OF SAN FRANCISCO. AN
12 INJUNCTION THAT JUST OPERATED AGAINST THE ENFORCEMENT OF THE
13 CITIES AND NOTHING MORE WOULD LEAVE US EXPOSED TO THOUSANDS
AND
14 THOUSANDS OF LAWSUITS IN STATE COURT BY INDIVIDUALS WHO CAN
15 GRAB THESE ENFORCEMENT MECHANISMS. SO I JUST FOCUS YOUR
HONOR

16 AGAIN ON THE --

17 THE COURT: I UNDERSTAND THAT. LET'S DEAL WITH THAT
18 SITUATION, IF WE ENCOUNTER IT. I SAID LET'S DEAL WITH THAT
19 SITUATION IF WE ENCOUNTER IT.

20 I THINK THE -- I WILL TRUST THAT THE CITIES ARE NOT

21 GOING TO TAKE ANY MEASURES TO ENFORCE THE ORDINANCE DURING
THE

22 PENDENCY OF THE PRELIMINARY INJUNCTION, AND WE'LL DEAL WITH
ANY

23 CIVIL ACTIONS THAT ARE BROUGHT DURING THE PENDENCY OF THE
CASE

24 IF THERE ARE ANY TO DEAL WITH.

25 MR. BRUCE: YOUR HONOR, IF I MAY BE HEARD ON THAT

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1 BECAUSE IT IS REALLY QUITE IMPORTANT.

2 AS TO SANTA MONICA, AS YOU KNOW, THEIR'S BECAME
3 EFFECTIVE ON NOVEMBER 11. AND UNLESS THIS COURT ORDERS THAT IT
4 BE SUSPENDED PENDING THE MERITS, AS WE ASK THE COURT TO DO,
AND

5 THAT IS JUST A MAINTENANCE OF THE STATUS QUO AT THE TIME OF THE
6 SUIT, IT WOULD BE -- OUR CLIENTS WOULD BE EXPOSED TO PUNITIVE
7 DAMAGES OF 5,000 PER TRANSACTION AND SO-CALLED ACTUAL
DAMAGES

8 OF \$250 PER TRANSACTION IN SUITS THAT WOULD BE FILED IN STATE
9 COURT BY INDIVIDUAL CITIZENS OF SANTA MONICA, OR FOR THAT
10 MATTER, TOURISTS IN SANTA MONICA, AND THE SAME WOULD APPLY
TO
11 SAN FRANCISCO.

12 THIS COURT WOULD THEN HAVE TO REACH OUT AND ENJOIN
13 ALL OF THESE INDIVIDUALS WHO ARE -- WHO WOULD FILE THESE
14 LAWSUITS IN STATE COURT, OR EVEN MORE DRAMATICALLY, IF YOU
15 WILL, WOULD HAVE TO SOMEHOW ENJOIN THE SMALL CLAIMS COURTS
OF
16 THE STATE OF CALIFORNIA FROM ENTERTAINING THESE SUITS. ABSENT
17 THAT KIND OF INJUNCTIVE RELIEF, THE BANKS WOULD BE EXPOSED TO
18 POTENTIALLY ENORMOUS LIABILITIES IF THEY DON'T COMPLY WITH THE
19 ORDINANCES.

20 THE COURT: WELL --

21 MR. BRUCE: THAT IS WHY WE WERE SO CAREFUL TO ASK --

22 THE COURT: IT IS DIFFERENT, IS IT NOT, IN SAN

23 FRANCISCO BECAUSE THE ORDINANCE HAS NOT BECOME EFFECTIVE?

24 MR. BRUCE: YES. SO LONG AS THE COURT IS CRYSTAL

25 CLEAR ON THIS, THAT THERE IS AN INJUNCTION AGAINST THE CITY OF

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1 SAN FRANCISCO FROM ALLOWING THE ORDINANCE TO BECOME
EFFECTIVE,

2 THEN THAT IS FINE. BECAUSE WITH THAT INJUNCTION, THAT LAW WILL
3 NEVER BE THERE FOR ANYONE TO INVOKE BECAUSE THE BOARD OF
4 SUPERVISORS WILL NOT BE ABLE TO TAKE THAT LAST ACT.

5 AS TO SANTA MONICA --

6 THE COURT: LET'S ASK MR. BERNHARD, IS THAT CLEAR?

7 MR. BERNHARD: THAT'S MY UNDERSTANDING OF THE
8 COURT'S ORDER.

9 THE COURT: VERY WELL.

10 MR. BRUCE: THAT'S FINE.

11 AS TO SANTA MONICA, I'M AFRAID WE WOULD BE LEFT IN
12 THE POSTURE OF REALLY AS A PRACTICAL MATTER HAVING TO COMPLY
13 WITH IT DURING THE COURSE OF THE LITIGATION. IF THAT'S YOUR
14 HONOR'S CHOICE, THEN, OF COURSE, THAT IS WITHIN YOUR DISCRETION
15 IN SHAPING EQUITABLE RELIEF ON A PRELIMINARY BASIS.

16 BUT IT IS ALSO WITHIN YOUR HONOR'S POWER UNDER THE
17 TANNER CASE, FOR EXAMPLE, AND OTHER CASES OF THE NINTH CIRCUIT
18 THAT WE DIDN'T BRIEF BECAUSE THE ISSUE REALLY WASN'T RAISED BY
19 THE OTHER SIDE, IT IS WITHIN YOUR HONOR'S POWER, PARTICULARLY
20 IN A CASE OF CONSTITUTIONAL DIMENSION, WHICH THIS IS, TO

21 RESTORE THE STATUS QUO BY ORDERING SANTA MONICA TO SUSPEND
THE

22 ORDINANCE. THEN YOU WOULD HAVE SOME KIND OF ACTION BY THE
23 SANTA MONICA GOVERNMENT THAT WOULD SUSPEND THE ORDINANCE.

24 WITH THAT ORDER FROM THIS COURT DIRECTLY TO SANTA

25 MONICA, NO SANTA MONICA CITIZEN COULD GO INTO THE STATE COURT

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1 AND START THESE LAWSUITS. SO I JUST WANTED TO DISCUSS --

2 THE COURT: LETS HEAR MR. RADINSKY ON THIS.

3 MR. RADINSKY: THERE IS A PROBLEM HERE, YOUR HONOR.

4 HE REFERS TO THE STATUS QUO. THE STATUS QUO IS THAT SINCE THEY
5 WAITED MORE THAN THREE WEEKS TO FILE THEIR LAWSUIT AGAINST
6 SANTA MONICA, THIS LAW WAS ALREADY ON THE BOOKS, AND ONLY A
7 MATTER OF DAYS BEFORE IT BECAME EFFECTIVE.

8 AS YOU RECOGNIZED IN OUR LAST HEARING, THE CITY
9 ATTORNEY'S OFFICE DOESN'T HAVE THE AUTHORITY TO UNDO A
10 LEGISLATIVE ACT THAT HAS ALREADY SEEN ITS FINAL STEP. THAT LAW
11 IS IN EFFECT, AND THEY CHOSE TO WAIT, SO THE STATUS QUO HERE IS
12 THAT THE SURCHARGE BAN IS IN EFFECT IN SANTA MONICA. AND HE IS
13 ASKING FOR A CHANGE TO THE STATUS QUO.

14 I DON'T KNOW THERE IS A MECHANISM TO DO THAT. AS WE
15 DISCUSSED LAST TIME, I DON'T HAVE THE AUTHORITY ON BEHALF OF
MY

16 OFFICE TO NULLIFY A LAW THAT OUR ELECTED REPRESENTATIVES
HAVE

17 PASSED WHICH HAS GONE PASSED ITS LAST STAGE.

18 NOW, I UNDERSTAND YOU TO BE ENJOINING OUR OFFICE,
19 FOR EXAMPLE, FROM PROSECUTING VIOLATIONS OR THE CITY FROM
20 TAKING ANY AFFIRMATIVE STEPS TO ENFORCE THIS LAW, BUT THAT IS A

21 FAR CRY FROM UNDOING THE LEGISLATIVE WILL THAT HAS ALREADY
22 PASSED ITS FINAL HURDLE, AND I WOULD SUBMIT THAT'S
23 EXTRAORDINARY RELIEF THEY'RE SEEKING, AND IT WOULD UPSET THE
24 STATUS QUO.

25 MR. BRUCE: MAY I RESPOND?

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1 THE COURT: YES.

2 MR. BRUCE: YOUR HONOR, THE WAY SANTA MONICA DID
3 THIS, AND THERE IS NOTHING WRONG WITH WHAT SANTA MONICA DID
4 PROCEDURALLY, AS I UNDERSTAND IT, AND I AM NOT A CALIFORNIAN,
5 IT IS THE WAY MOST MUNICIPAL LAW WORKS, THAT THE CITY COUNCIL
6 HAS A FIRST READING OF A PROPOSED MEASURE. AND THEY TAKE A
7 VOTE ON IT.

8 THEY DID THAT A WEEK BEFORE OCTOBER THE 12TH. THEN,
9 IN A WEEK PERIOD, THEY HAD A SECOND READING, AND IT WAS
10 APPROVED FOUR TO THREE.

11 UNDER CALIFORNIA LAW, THAT IS THE LAST ACT. THERE
12 IS NOTHING LEFT IN PROCESS. SO THAT 30 DAYS LATER, IT
13 AUTOMATICALLY BECAME EFFECTIVE, UNLESS, UNLESS THERE WAS AN
14 ORDER TO THE CITY COUNCIL ITSELF TO AN EFFECT RESCIND WHAT IT
15 DID.

16 NOW, I MADE A JUDGMENT THAT WE WOULD NOT COME TO
17 THIS COURT FOR A TEMPORARY RESTRAINING ORDER TO PREVENT THE
18 CITY, TO PREVENT THE SANTA MONICA ORDINANCE FROM BECOMING
19 EFFECTIVE BECAUSE A TEMPORARY RESTRAINING ORDER WOULD HAVE
HAD
20 TO HAVE AN AFFIRMATIVE RELIEF ELEMENT IN IT. AND I MADE THE

21 JUDGMENT, IT MIGHT HAVE BEEN WRONG, THAT THIS COURT WOULD
22 HAVE -- YOU DO HAVE THE AUTHORITY ON THE PRELIMINARY
INJUNCTION
23 TO GIVE THAT AFFIRMATIVE RELIEF AND THERE WOULD BE A SHORT
24 PERIOD OF TIME BETWEEN THE 11TH OF NOVEMBER AND TODAY'S THE
25 15TH, FOUR DAYS THERE WOULD HAVE TO BE COMPLIANCE, BUT THAT
THE

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1 COURT DOES HAVE THE AUTHORITY TO ASK OR DIRECT THE CITY
2 COUNCIL, OR THE CITY OF SANTA MONICA TO SUSPEND ITS ORDINANCE.

3 THE STATUS QUO IS, AND THIS IS THE TANNER CASE, 316
4 F.2D, 804 AT 808, 1963 DECISION OF THE NINTH CIRCUIT, THE
5 STATUS QUO IS THE LAST UNCONTESTED STATUS THAT PRECEDED THE
6 CONTROVERSY. OF COURSE, WE FILED OUR LAWSUIT, I FORGET HOW
7 MANY DAYS, BUT SUBSTANTIALLY BEFORE THE EFFECTIVE DATE.

8 THIS COURT HAS FULL POWER, ESPECIALLY ON A CASE OF
9 CONSTITUTIONAL DIMENSIONS, TO DIRECT THE CITY OF SANTA MONICA
10 NOT TO RESCIND FOREVER BUT TO SUSPEND THE ORDINANCE DURING
THE

11 PERIOD OF THE PRELIMINARY INJUNCTION. IF THE COURT DOES THAT,
12 THEN IT TOO WILL BE IN THE SAME POSTURE AS SAN FRANCISCO.

13 IF THE COURT DOESN'T DO THAT, THEN THE SANTA MONICA
14 ORDINANCE FOR ALL PRACTICAL PURPOSES, WILL HAVE TO BE
REGARDED

15 BY THE BANKS AS IN EFFECT BECAUSE THEY COULDN'T STAND THE
16 PROSPECT OF THAT \$5,000 PUNITIVE DAMAGES AND 250 PER
17 TRANSACTION.

18 MR. RADINSKY: MAY I BE HEARD BRIEFLY, YOUR HONOR,
19 ON WHAT HE RAISED.

20 AT THE LAST HEARING, COUNSEL FOR THE BANKS

21 SPECIFICALLY SAID WHEN YOU ADDRESSED WHY THE DELAY ON SANTA
22 MONICA, THEY SAID THAT THEY WOULD QUOTE TAKE THEIR "LUMPS"
23 UNQUOTE IN SANTA MONICA, AND ALSO REFERRED TO SANTA MONICA
AS
24 THE TAIL WAGGING THE DOG IN THIS CASE.
25 WHAT THEY WERE SAYING WAS THEY'RE REALLY NOT TOO

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1 CONCERNED ABOUT SANTA MONICA. THEY COULD HAVE FILED A
LAWSUIT

2 ALMOST A MONTH BEFORE THEY DID WHEN THE FIRST VOTE HAPPENED
ON

3 OCTOBER 5TH, THEY CHOSE NOT TO. THEY MADE A TACTICAL DECISION

4 THAT WHEN THERE WAS STILL TIME FOR THE CITY COUNCIL TO TAKE ITS

5 FINAL ACT, THEY COULD HAVE COME UP HERE OR MORE
APPROPRIATELY

6 DOWN THERE, WHICH IS WHERE WE ARE SUPPOSED TO BE, AND SOUGHT

7 EMERGENCY RELIEF BEFORE THE FINAL ACT WAS TAKEN. THEY CHOSE

8 NOT TO DO THAT. THEY CHOSE TO TAKE THEIR LUMPS AS MR. DARWIN

9 SAID, AND THIS IS AN EXAMPLE OF THAT.

10 YOUR HONOR, IF YOU DO WHAT HE IS ASKING, YOU WOULD

11 BE UNDOING A LEGISLATIVE ACT THAT HAS ALREADY BEEN DONE.

12 THE COURT: LET'S BOTH BE PRACTICAL AND ALSO LET'S

13 TAKE A LOOK AT THE LAW. I AM GOING TO ASK MR. BRUCE AND HIS

14 COLLEAGUES TO PUT TOGETHER A BRIEF MEMORANDUM ON THIS
SUBJECT

15 INFORMING ME OF THAT TANNER CASE THAT YOU REFERRED TO AND
ANY

16 OTHER AUTHORITIES THAT YOU BELIEVE ARE APPLICABLE, AND GIVE

17 MR. RADINSKY AN OPPORTUNITY TO RESPOND.

18 AND ALSO TO BE PRACTICAL ABOUT IT, IT MAKES A GREAT

19 DEAL OF SENSE TO PLACE BOTH DEFENDANTS ON THE SAME POSTURE IN
20 TERMS OF THE ENFORCEMENT OF THE ORDINANCE, AND ALSO TO HAVE
THE

21 SITUATION IN BOTH CITIES THE SAME.

22 SO, I MUST SAY I AM INCLINED TO GRANT RELIEF WHICH
23 WOULD ACCOMPLISH THAT, BUT I WILL BE GUIDED BY WHATEVER
24 ADDITIONAL GUIDANCE YOU CAN GIVE ME IN A MEMORANDUM.

25 HOW LONG WOULD YOU NEED TO PREPARE THAT MEMORANDUM?

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1 MR. BRUCE: WELL, I WOULD LIKE AT LEAST UNTIL, TODAY
2 IS MONDAY, COULD WE HAVE UNTIL WEDNESDAY, YOUR HONOR?

3 THE COURT: THAT WOULD BE FINE.

4 MR. RADINSKY, CAN YOU GET IN A RESPONSE BY NEXT
5 MONDAY?

6 THAT WILL BE ONE WEEK FROM TODAY.

7 MR. RADINSKY: YES, YOUR HONOR, WE CAN DO THAT.

8 THE COURT: ALL RIGHT. AS I UNDERSTAND IT, THE
9 BANKS ARE NOT CHARGING FEES IN SANTA MONICA AT THE PRESENT
10 TIME?

11 MR. BRUCE: THE BANKS ARE COMPLYING WITH THE --

12 THE COURT: SO, THAT CAN CONTINUE FOR ANOTHER WEEK,
13 AT LEAST ANOTHER WEEK UNTIL WE SEE WHAT THE LAW IS --

14 MR. RADINSKY: CAN I HAVE A WEEK AFTER THEIR BRIEF?
15 WE HAVE BEEN DOING EVERYTHING SO RUSHED, I'M GETTING USED TO
16 IT, BUT WE WOULD LIKE --

17 THE COURT: THIS IS A NARROW POINT, MR. RADINSKY.
18 IT IS A NARROW POINT AND WE OUGHT TO SETTLE THE TERMS OF THE
19 INJUNCTION AS SOON AS POSSIBLE.

20 MR. BRUCE: THANK YOU, YOUR HONOR.

21 THE COURT: ALL RIGHT? ANYTHING FURTHER?

22

23 MR. BERNHARD: THERE IS, YOUR HONOR, VERY BRIEFLY.

24 FIRST -- TWO THINGS. FIRST THE PROPOSED ORDER THAT

25 PLAINTIFFS HAVE SUBMITTED. THIS ORDER DOESN'T APPEAR TO

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1 INCLUDE THE CALIFORNIA BANKING ASSOCIATION, VERY ACTIVE
2 PLAINTIFFS AND PARTICIPANTS IN THIS LITIGATION.

3 AS THE COURT ALREADY NOTED, IT ONLY IMPOSED
4 OBLIGATIONS ON THE PARTIES BEFORE IT AND CBA IS BEFORE YOU.
5 THIS ORDER -- I AM REFERRING SPECIFICALLY TO PAGE 3, ITEM 3
6 ABOUT THE ESCROW AND THE FUNDS, THAT SHOULD APPLY TO THE
7 CALIFORNIA BANK ASSOCIATION AS WELL.

8 THE COURT: I DON'T KNOW THAT THE -- DOES THE BANK
9 ASSOCIATION --

10 MR. BERNHARD: THEY ARE IN THIS COURT, THEY SAY,
11 BECAUSE THEY HAVE OVER 280 --

12 THE COURT: I UNDERSTAND, BUT THEY ARE NOT A
13 DEPOSITORY INSTITUTION, ARE THEY?

14 MR. BERNHARD: THEY REPRESENT 280 MEMBERS.

15 THE COURT: MR. KASS?

16 MR. KASS: AS YOUR HONOR POINTS OUT, WE ARE HERE ON
17 A REPRESENTATIONAL CAPACITY ONLY, AND THE VARIOUS MEMBER
BANKS
18 ARE NOT THE PARTIES TO THIS AS YOUR HONOR MENTIONED EARLIER.
19 IT WOULD BE DIFFICULT TO -- I DON'T SEE HOW WE CAN
20 MAKE THEM SUBJECT TO THAT PROVISION. SO I DON'T -- THAT BEING

21 SAID, I DON'T SEE THAT THERE IS GOING TO BE ANY PROBLEM WITH
22 THEM DOING EXACTLY WHAT THE BANKS THAT ARE PARTIES TO THIS
23 ACTION ARE DOING, WHICH IS THE RESPONSIBLE THING TO DO.

24 THE COURT: LET'S SEE IF WE CAN AVOID THE PROBLEM.

25 ARE YOU IN A POSITION ON BEHALF OF YOUR MEMBERS TO REPRESENT

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1 THAT THEY WILL FOLLOW THE SAME ESCROW PROCEDURES AS BANK OF
2 AMERICA AND WELLS FARGO?

3 MR. KASS: WHAT I AM IN A POSITION TO REPRESENT AT
4 THIS POINT IS THAT I THINK IT WOULD BE REASONABLE TO INSTRUCT
5 THAT ANY FINANCIAL INSTITUTION THAT IS A MEMBER OF CBA THAT
6 INTENDS TO AVAIL ITSELF OF THE INJUNCTIVE RELIEF THAT THIS
7 COURT IS ORDERING, DOES SO CONDITIONED ON COMPLYING WITH THE
8 SAME INSTRUCTIONS THAT YOU ARE MAKING WITH RESPECT TO THE
9 PLAINTIFF BANKS.

10 THE COURT: IS THAT SATISFACTORY, MR. BERNHARD?

11 MR. BERNHARD: I AM NOT SURE. I AM NOT SURE IF I
12 UNDERSTAND EXACTLY WHAT IT MEANS.

13 WHAT I AM CERTAIN OF IS THAT MR. CHENOWETH, OFFICIAL
14 OF CBA SUBMITTED A DECLARATION, AND HE ALSO, I BELIEVE, SAID
15 THAT THEY COULD ESCROW FUNDS. AND WE WOULD LIKE HIM TO LIVE
UP
16 TO THAT PROMISE.

17 THE COURT: WELL, I AM RELUCTANT, WOULD BE MORE THAN
18 RELUCTANT TO ENJOIN PARTIES THAT ARE NOT BEFORE ME.

19 CBA IS NOT A DEPOSITORY INSTITUTION. I AM RATHER
20 INCLINED TO THINK THAT IT MIGHT BE A USEFUL WAY TO BEGIN THIS

21 LITIGATION, SINCE WE ARE STILL AT A VERY EARLY STAGE, TO ASK
22 YOU, MR. BERNHARD TO TALK TO MR. KASS AND SEE IF THERE ISN'T A
23 PRACTICAL SOLUTION TO YOUR CONCERNS.

24 MR. BERNHARD: I WOULD BE HAPPY TO DO THAT.

25 THE COURT: ANYTHING FURTHER?

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1 MR. BERNHARD: I HAVE ONE LAST MATTER, YOUR HONOR.
 2 AT THIS TIME, DEFENDANTS ASK THE COURT TO STAY ITS ORDER FOR 30
 3 DAYS TO PERMIT DEFENDANTS AN OPPORTUNITY TO OBTAIN RELIEF.

4 THE COURT: MR. BRUCE?

5 MR. BRUCE: THIS IS A STAY PENDING APPEAL?

6 THE COURT: STAY PENDING APPEAL.

7 MR. BERNHARD: IT'S FOR A STAY PENDING APPLICATION
 8 FOR RELIEF.

9 MR. BRUCE: YES.

10 MR. BERNHARD: -- TO THE NINTH CIRCUIT.

11 MR. BRUCE: YOUR HONOR, WE FULLY EXPECT THEM TO GO
 12 TO THE COURT OF APPEALS, AS YOUR HONOR INDICATED IN YOUR
 13 DECISION.

14 A STAY OF 30 DAYS COULD, I AM NOT SAYING SAN
 15 FRANCISCO WOULD DO THIS, BUT IT COULD PUT THE BOARD OF
 16 SUPERVISORS IN A POSITION THAT THEY WOULD GO AHEAD AND ALLOW
 17 THE SAN FRANCISCO ORDINANCE TO BECOME EFFECTIVE, BECAUSE 30
 18 DAYS FROM TODAY IS DECEMBER THE 15TH. AND LEFT -- THAT WOULD
 19 BE VERY UNWISE, I THINK, FOR THEM TO DO THAT, AND MAYBE

20 MR. BERNHARD CAN GIVE US SOME COMFORT IN TERMS OF AN
 ASSURANCE

21 THAT DURING THAT STAY PERIOD, SAN FRANCISCO WILL NOT ALLOW
ITS

22 ORDINANCE TO BECOME EFFECTIVE.

23 THE COURT: WELL, IF I DENY THE STAY, MR. BERNHARD
24 HAS HIS RECORD.

25 MR. BRUCE: IF YOU DENY THE STAY, WE OBVIOUSLY HAVE

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1 NO PROBLEM WITH THAT.

2 THE COURT: MR. BERNHARD HAS HIS RECORD.

3 MR. BRUCE: YES, THANK YOU.

4 THE COURT: I THINK I WILL UNDER THE CIRCUMSTANCES

5 SINCE WE ARE GOING TO BE SETTTLING THE EXACT TERMS OF THE ORDER

6 WITH RESPECT TO ALL OF THESE MATTERS WE HAVE DISCUSSED IN THE

7 NEXT FEW DAYS, AN EFFECTIVE STAY IS NOT APPROPRIATE, BUT YOU

8 HAVE MADE YOUR RECORD AND REQUESTED THE COURT TO STAY, AND
THAT

9 HAS BEEN DENIED.

10 MR. BERNHARD: THANK YOU, YOUR HONOR.

11 THE COURT: ALL RIGHT? ANYTHING FURTHER?

12 MR. BRUCE: NO, YOUR HONOR.

13 THE COURT: VERY WELL. THANK YOU, COUNSEL.

14

15

16

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CERTIFICATE OF REPORTER

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